No. 87-645

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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F. CLARK HUFFMAN, *et al.*,
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF OF ELECTRIC UTILITY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## BRIEF OF ELECTRIC UTILITY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

In accordance with this Court's Rule 36, the domestic electric utility companies listed below[1] (the "Utilities")

[1] The Utilities include:

Alabama Power Company
Arkansas Power and Light Company
Baltimore Gas and Electric Company
Cleveland Electric Illuminating Company
Connecticut Light and Power Company
Duke Power Company
Georgia Power Company
Iowa Electric Light and Power Company
Kansas City Power and Light Company
Kansas Electric Power Cooperative, Incorporated
Kansas Gas and Electric Company
Louisiana Power and Light Company
MSU System Services, Incorporated

[Continued]

have received the written consent of the parties to file this brief as *amici curiae* in support of the position of petitioners F. Clark Huffman, *et al.* Copies of the letters of consent have been filed with the Clerk.

## INTRODUCTION

In this case, the Court is called upon to decide whether the Department of Energy ("DOE" or the "Department") correctly interpreted its responsibilities under section 161v of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v) (1982) ("section 2201(v)"). At issue is the meaning of the second proviso of section 2201(v), which states that DOE:

> *to the extent necessary to assure the maintenance of a viable domestic uranium industry*, shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

(Emphasis added.) On September 26, 1985, the Secretary of DOE issued a determination that the domestic uranium industry was not viable in calendar year 1984. Memorandum for The President from DOE Secretary John S. Herrington (Sept. 26, 1985) ("Herrington

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[1] [Continued]

Ohio Edison Company
Pennsylvania Power and Light Company
Power Authority of the State of New York
Public Service Electric and Gas Company
Southern California Edison Company
System Energy Resources, Incorporated
Texas Utilities Electric Company
The Toledo Edison Company
Union Electric Company
Virginia Electric and Power Company
Western Massachusetts Electric Company
Wisconsin Electric Power Company
Wolf Creek Nuclear Operating Corporation



Memo."). Nevertheless, DOE did not impose enrichment restrictions on foreign-origin uranium under section 2201(v), because it concluded that such restrictions would not assure the viability of the domestic industry, and, in that circumstance, enrichment restrictions were not required by statute. *Id.*; *see also* 51 Fed. Reg. 3624, 3627 (1986).

Enacted in 1964 as section 16 of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964) ("Private Ownership Act"), section 2201(v) generally authorized DOE to enter into contracts to enrich privately-owned uranium. It required DOE to establish written criteria setting forth the terms and conditions under which its enrichment services would be offered—including the extent to which such services would be made available for foreign uranium intended for use in the United States—and it made the criteria subject to prior Congressional review.

Congress did not disapprove the criteria proposed in 1973 by DOE's predecessor, the Atomic Energy Commission, to phase out by 1984 all restrictions on the enrichment of foreign uranium intended for use in this country. *See* 39 Fed. Reg. 38,016, 38,017 (1974) (modification of restrictions on enrichment); 38 Fed. Reg. 32,595, 32,596 (1973) (notice of proposed modification). Similarly, in 1983, as an alternative to proposed legislation requiring DOE to reimpose enrichment restrictions on foreign uranium in certain circumstances, *see* H.R. Rep. No. 884, 97th Cong., 2d Sess. 17, 52 (1982), Congress enacted section 170B of the Atomic Energy Act, 42 U.S.C. § 2210b (1982) ("section 2210b"). Section 2210b requires DOE to issue an annual report for the years 1983 to 1992 on the viability of the domestic uranium industry and, depending upon the Department's findings, to request the initiation of specific U.S. international trade law investigations with respect to uranium im-

ports. *See* 19 U.S.C. §§ 1862, 2251 (1982 & Supp. IV 1986) (investigations authorized).

In its first annual report, issued in December 1984, DOE determined that the domestic uranium industry had been viable in 1983. Letter from DOE Secretary Donald Paul Hodel to George Bush, President of the Senate (Dec. 31, 1984) ("Hodel Letter"); Energy Information Adm., DOE, Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment (1984). Also in December 1984, the respondent domestic uranium mining and milling companies initiated this lawsuit. Respondents alleged, among other things, that DOE's failure to impose enrichment restrictions on foreign uranium was unlawful, and they sought an order compelling the Department to begin a rulemaking to determine the appropriate level of enrichment restrictions. Petition For Certiorari at 13. Subsequently, respondents asked the district court for an order imposing judicially-mandated restriction levels. *Id.*

In September 1985, the Secretary of DOE issued his determination that the uranium industry had not been viable in 1984 but that enrichment restrictions would not help the industry. Herrington Memo. At the same time, he requested the assistance of the United States Trade Representative in assessing whether the Department's findings of fact about the domestic industry would provide the basis for successful investigations under the U.S. trade laws. Letter from DOE Secretary John S. Herrington to U.S. Trade Representative Clayton Yeutter (Sept. 26, 1985) ("Letter to Yeutter"). In December 1985, the Trade Representative advised the Secretary that successful trade investigations could not be brought and, further, that any import relief "would not be sufficient to make the domestic industry viable[.]" Letter from U.S. Trade Representative Clayton Yeutter to DOE Secretary John S. Herrington (Dec. 26, 1985) ("Yeutter Response").



In January 1986, DOE began a rulemaking to revise its enrichment criteria in response to market changes and the depressed condition of the domestic industry. 51 Fed. Reg. at 3625 (notice of proposed rulemaking). Throughout the course of the rulemaking, however, the Department reiterated its prior conclusion that to reimpose restrictions on the enrichment of foreign uranium "could further damage the U.S. mining industry," *id.* at 3627, and thus would be "counterproductive." 51 Fed. Reg. 15,632 (1986) (notice of additional comment period).

Nevertheless, respondents insist that section 2201(v) requires DOE to impose restrictions automatically upon a finding that the domestic industry is not viable. The district court below agreed, and issued an injunction that would require DOE as of January 1, 1987 to refuse to enrich any foreign uranium for domestic use. Petition For Certiorari at 23a. On appeal, the Tenth Circuit upheld the district court's injunction. *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1440 (10th Cir. 1987), *cert. granted*, —— U.S. ——, 108 S. Ct. 692 (1988).

## INTEREST OF THE *AMICI CURIAE* ELECTRIC UTILITY COMPANIES

The Utilities filing this brief as *amici curiae* will be vitally affected by the injunction. Each of the Utilities is licensed by the Nuclear Regulatory Commission to construct, own, or operate one or more nuclear reactors. In order to operate their nuclear reactors, the Utilities depend on sufficient, timely, and economical supplies of enriched uranium. Each of the Utilities currently has one or more contracts or options to supply DOE with natural uranium for the Department to enrich into usable reactor fuel. These contracts with DOE contain no restrictions on enrichment of foreign-origin uranium, and the Utilities have relied on them to purchase, or contract for the purchase of, significant quantities of uranium from abroad. As of January 1, 1985, U.S. utility com-

panies were estimated to hold contracts or options for natural uranium from foreign sources in 1985-1990 totaling 30.6 million pounds of $U_3O_8$—with a value of approximately $780 million dollars. *See* Affidavit of Loring E. Mills ¶ 3, *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942), *cert. granted*, —— U.S. ——, 108 S. Ct. 692 (1988) ("Mills Aff."), *reprinted as* Appendix A to the Utilities' Brief In Support Of Petition For Certiorari; Petition For Certiorari at 24 n.18.

As Congress recognized in enacting section 2201(v), "it is essential that utility companies and the atomic energy industry be able to plan on a long-term basis in the context of normal economic conditions. This is especially true with respect to commitments for fuel." S. Rep. No. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3113. The Utilities' need for stable, long-term fuel supply and enrichment contracts is as great today as it was in 1964. Yet unless this Court reverses the decision below, the injunction will abruptly frustrate the Utilities' fuel supply and enrichment expectations.

Under the injunction, the Utilities will be unable to have the uranium they purchased or contracted to purchase abroad enriched pursuant to their contracts with DOE. The Utilities' obligations to provide their customers with a reliable supply of electricity at a reasonable cost, however, will require them to take all necessary steps to obtain sufficient, economical supplies of enriched uranium to support continued operation of their nuclear plants. Mills Aff. ¶ 6. Utilities with foreign uranium under contract may be forced to shift their demand for enrichment services overseas and away from DOE.[2] The increased demand will drive up the price of

[2] *See* Declaration of Sherry E. Peske ¶¶ 8-11, Appellants' App. To Motion For Stay 80, 83-85, *Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430 (10th Cir. 1987) (No. 86-1942), *cert. granted*, —— U.S. ——, 108 S. Ct. 692 (1988) ("Peske Decl.").



foreign enrichment services. Moreover, as fewer utility companies bring uranium to DOE for enrichment, DOE will have to raise the price of enrichment services to its remaining customers in order to comply with its statutory requirement to recover its costs. *Id.* ¶ 6(a); *see* 42 U.S.C. § 2201(v). Utilities with foreign uranium already on hand may attempt to purchase stockpiled domestic uranium from other domestic utility companies to enrich under their contracts with DOE. Such uranium will be hard to obtain as the other companies hoard their own supplies for the future, and it will command a premium when it is available. Mills Aff. ¶ 6(b). Finally, some utility companies may seek to purchase current production from domestic uranium suppliers. If none of the other alternatives are feasible and all of the domestic utility companies must obtain their uranium requirements in this country, the domestic uranium industry will be unable to produce economically the amount of uranium required. In fact, domestic producers are already importing foreign uranium for resale to U.S. utilities, because it is more profitable for them than mining and milling additional quantities from their own domestic resources. *See* 51 Fed. Reg. 27,132, 27,135 (1986). The mining industry will certainly raise the price of any additional uranium it does produce in order to cover its higher marginal costs—and to take advantage of the surge in demand created by the injunction. *See* Mills Aff. ¶ 6(c).

Thus, it is inevitable that the Utilities, pursuing any of the options available to them if the injunction takes effect, will end up with "duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both." *Id.* ¶ 10. Lengthy and expensive litigation over a host of contractual issues is sure to follow. *See id.* "Under traditional principles of electricity rate regulation, the increased uranium costs, the increased prices for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric-

rates and ultimately would be borne by the consumers of electricity." *Id.* ¶ 12.

These increased costs to the Utilities and their customers throughout the country are wholly unnecessary. Moreover, there is no assurance whatsoever that the injunction will result in increased domestic production of uranium. It is far more likely that there will be no significant change in domestic production. Rather, DOE will lose enrichment sales to its overseas competitors, and domestic utility companies will increase their reliance on foreign enrichment services and maintain or increase their reliance on foreign uranium. The nonviability of the domestic uranium industry is not attributable to uranium imports, but to the unanticipated decline in the demand for nuclear power, the cancellation of power plants, the failure of domestic mining and milling companies to decrease uranium production in response to the decrease in consumption, the build-up of utility inventories of natural and enriched uranium, and the emergence of secondary and foreign markets for both natural and enriched uranium. *See* Peske Decl. ¶ 4. An injunction barring DOE enrichment of foreign uranium therefore would not redress the injuries alleged by respondents.

## SUMMARY OF ARGUMENT

The court below construed section 2201(v) to require DOE to ignore its own findings about the state of the domestic uranium industry. The court ordered DOE not to enrich foreign uranium because DOE had concluded that the domestic industry is not viable, even though the Department also found that enrichment restrictions would not "assure the maintenance of" a viable domestic industry. *See Western Nuclear, Inc. v. Huffman*, 825 F.2d at 1440. The holding of the court below should be reversed because the plain meaning of section 2201(v) grants DOE the discretion to determine whether enrichment restrictions are "*necessary* to assure the maintenance of" a viable domestic industry (emphasis added), and because the Department's decision not to impose such restrictions was a reasonable administrative interpretation to which a reviewing court should defer.



Section 2201 contains 24 subsections setting forth numerous duties of DOE and the Nuclear Regulatory Commission. 42 U.S.C. § 2201 (1982). Where Congress wanted to require a specific action to follow a particular agency finding, it did so—but not in section 2201(v). *See id.* § 2201(q). Where Congress wanted to scrutinize DOE's judgment about enriching or not enriching foreign uranium, it did so—in the third proviso of section 2201(v), which requires the Department to submit its proposed enrichment criteria to Congress for a 45-day review. In the second proviso of section 2201(v)—the actual words at issue in this litigation—Congress simply instructed DOE to restrict enrichment services for foreign uranium intended for use in the United States "to the extent necessary" to assure the maintenance of a viable domestic uranium industry. That language is the same language used elsewhere in section 2201 to signify that a specific action has been left to the agency's discretion. Thus, the plain meaning of the second proviso of section 2201(v) is that DOE shall restrict enrichment services for foreign uranium to the extent that DOE, exercising the discretion clearly granted by the statute, deems such restrictions necessary to assure the domestic industry's viability. If DOE determines that the domestic industry cannot be made viable by enrichment restrictions, the Department is authorized under section 2201(v) not to impose them.

Section 2201(v) was added to the Atomic Energy Act in 1964, along with other provisions, to establish more market-oriented economic conditions for an atomic energy industry converting to peacetime applications. Virtually the only commercial application Congress contemplated was the use of nuclear power to generate elec-

tricity, and the legislative history of the Private Ownership Act recognized the need of electric utility companies to rely on long-term fuel supply contracts. *See* S. Rep. No. 1325 at 3113. Despite its concern for the viability of the domestic uranium industry, in section 2201(v) Congress made DOE's duty to impose enrichment restrictions on foreign uranium "flexible both as to the duration and degree," *id.* at 3135, leaving DOE free to impose no degree of restrictions if it found they would not assure the industry's viability. Further, Congress expressly rejected a proposal in 1982 requiring DOE to reimpose enrichment restrictions automatically when uranium imports exceeded a specified percentage of domestic requirements. *See* 128 Cong. Rec. H8802-8809 (daily ed. Dec. 2, 1982).

In deciding not to impose enrichment restrictions under section 2201(v), DOE properly balanced its finding that restrictions would not return the uranium industry to viability with the costs such restrictions would have for other sectors of the atomic energy industry, including the nation's electric utilities and their customers. Its decision is entitled to deference under the principles this Court articulated in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Even if the court below was correct in ruling that DOE misinterpreted its responsibilities under the statute, however, the court's remedy—an injunction immediately and indefinitely suspending all enrichment services for foreign uranium—ousts the Department of its primary jurisdiction over the promulgation of enrichment criteria and deprives Congress of its role in scrutinizing the criteria. As such, the injunction undermines the division of power inherent in the Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982).



## ARGUMENT

### I. DOE'S AUTHORITY TO RESTRICT ENRICHMENT OF FOREIGN URANIUM IS DISCRETIONARY UNDER THE PLAIN MEANING OF SECTION 2201(v).

#### A. The Discretionary Language Used In Section 2201(v) Is Consistent With The Language Used Throughout Section 2201.

Section 2201 sets forth the general duties of the Atomic Energy Commission (now divided between the Nuclear Regulatory Commission and the DOE). Some of the duties are set forth broadly, and the Commission is left free to discharge them without further statutory restrictions. For example, the Commission is authorized to establish "such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material *as [it] may deem necessary or desirable* to promote the common defense and security or to protect health or to minimize danger to life or property." *Id.* § 2201(b) (emphasis added). Similarly, the Commission is authorized to "prescribe such regulations or orders *as it may deem necessary*" to guard against the loss or diversion of certain special nuclear materials or to prevent "any use or disposition thereof *which the Commission may determine* to be inimical to the common defense and security[.]" *Id.* § 2201(i) (emphasis added).

Other duties set forth in section 2201 are made subject to requirements or provisos that the Commission abide by certain standards, guidelines, or criteria. Thus, the Commission is authorized to enter into contracts for the purchase or acquisition of supplies, equipment, materials, or services whenever it determines that to do so is justified by certain guiding cost/benefit principles enumerated in the statute. *Id.* § 2201(u)(2)(A),(B). Likewise, the Commission is authorized to enter into various production-related activities with specified li-

censees and to make certain nuclear materials available, in some cases for sale, to such licensees, provided that it "shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, *in the opinion of the Commission*, will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the Commission." *Id.* § 2201(m) (emphasis added). These and similar requirements, however, do not dictate the precise content or outcome of the Commission's acts. *See also id.* § 2201(d) (authority to set salary rates); § 2201(e) (authority to grant permits to operate commercial businesses at project sites). That is still left to the Commission to decide.

Only a few of the duties set forth in section 2201 are subject to requirements or provisos that mandate the precise content or outcome of the Commission's acts, and these are narrowly drawn. Section 2201(s) authorizes the Commission to establish a plan for a succession of authority to assure the continuity of operations in the event of a national disaster due to enemy activity, "*Provided*, That any such succession to authority, and vesting of authority shall be effective only in the event and as long as a quorum of three or more members of the Commission is unable to convene and exercise direction during the disaster period[.]" *Id.* § 2201(s). Section 2201(q) authorizes the Commission to grant certain rights-of-way over land under its jurisdiction and control, "*Provided*, That such rights-of-way shall be granted only upon a finding by the Commission that the same will not be incompatible with the public interest[.]" *Id.* § 2201(q).

It was to this statutory framework that section 2201(v) was added in 1964 by the Private Ownership Act. Section 2201(v) authorizes DOE to enter into cer-



tain contracts for the production or enrichment of special nuclear material, subject to two provisos, of which the second is at issue in this litigation. Further, section 2201(v) directs DOE to establish criteria setting forth the terms and conditions under which such production and enrichment services generally shall be made available, and that authorization is subject to a third proviso. In full, section 2201(v) authorizes DOE, in the performance of its functions, to:

> (A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the [Department] may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the [Department]; and
>
> (B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the [Department] in accordance with and within the period of an agreement for cooperation arranged pursuant to section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:
>
> *Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the [Department], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The [Department] shall establish criteria in

> writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the [Department] establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five day period.

DOE's primary responsibility under section 2201(v), to enter into production or enrichment contracts, is set forth initially with language of broad authorization: the Department may enter into such contracts "for such periods of time as [it] may deem necessary or desirable" to provide for such services. Under the first proviso of section 2201(v), however, DOE must comply with several standards. It must establish prices on a nondiscriminatory basis. It may not establish prices for the services under paragraph (B) (production or enrichment services under international arrangements) which are less than the prices established for services under paragraph (A) (production or enrichment services for domestic licensees). It must establish prices on a basis to recover the government's costs over a reasonable period of time.

Then comes the second proviso: "That the [Department], *to the extent necessary to assure the maintenance of a viable domestic uranium industry*, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility



within or under the jurisdiction of the United States." (Emphasis added.) The key language in this proviso—"to the extent necessary"—is the same language used throughout section 2201 (including the opening clause of section 2201(v)) to signify that a matter has been left by the statute to the Department's discretion. *See, e.g., id.* § 2201(b), 2201(i); *see also id.* § 2201(q) ("*Provided further*, That such rights-of-way shall not include any more land than is reasonably necessary for the purpose for which granted"). Congress used very different language elsewhere in section 2201 when it wanted to dictate, either generally or upon the occurrence of a particular contingency, the exact content or outcome of DOE's acts. *See id.* § 2201(q), 2201(s). The second proviso in section 2201(v) does not contain such language. It does not even contain language closely circumscribing DOE's discretion in the manner of the first proviso in section 2201(v).

### B. The Language Used In Section 2201(v) Plainly Authorizes DOE Not To Impose Enrichment Restrictions That Would Not, In DOE's Opinion, Assure Or Maintain A Viable Domestic Uranum Industry.

The plain meaning of section 2201(v) is that DOE shall not offer enrichment services for foreign uranium intended for use in this country to the extent that DOE, exercising the discretion clearly granted it by the statute, deems enrichment restrictions necessary to assure the maintenance of a viable domestic uranium industry. To the extent that DOE determines that the domestic industry cannot be made viable by enrichment restrictions, the Department is authorized under section 2201(v) not to impose them. If Congress wanted to trigger enrichment restrictions automatically upon a finding by DOE that the domestic uranium industry is not viable, it would have used language to indicate that intention—as it did in section 2201(q), where the statute expressly provides that rights-of-way "shall be

granted *only upon a finding* by the [Department] that the same will not be incompatible with the public interest[.]" *Id.* § 2201(q) (emphasis added). Moreover, where Congress wanted to oversee DOE's judgment about the advisability of making enrichment services available for foreign uranium, it did so plainly—in the third proviso of section 2201(v). There, Congress required DOE to submit its proposed enrichment criteria for a 45-day review, during which period Congress could disapprove them. The second proviso of section 2201(v), however, simply authorizes DOE to decide whether enrichment restrictions are "necessary to assure the maintenance of a viable domestic uranium industry." That is, Congress left the imposition of restrictions to DOE's discretion.

This Court recently construed similar statutory language in *Young v. Community Nutrition Institute*, —— U.S. ——, 106 S. Ct. 2360 (1986). In that case, the statute in question provided that when certain poisonous or deleterious food additives are required or unavoidably present, "the Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity therein or thereon *to such extent as he finds necessary* for the protection of public health . . . ." *Id.* at 2362, *quoting* 21 U.S.C. § 346 (1982) (emphasis added). The Court found that this language was ambiguous because its syntax did not clearly indicate whether "to such extent" modified "shall" or "the quantity therein or thereon."

> A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner's position to prevail, have placed "to such extent as he finds necessary for the protection of public health" as an appositive phrase immediately after "shall" rather than as a free-floating phrase after "the quantity therein or thereon."

106 S. Ct. at 2364. Nevertheless, the Court upheld, as a reasonable construction of the statute, the interpretation



of the petitioner, the Commissioner of the Food and Drug Administration, that whether regulations are necessary to protect the public health is a determination to be made by the FDA. *Id.* at 2365.

In contrast to the statutory provision construed in *Young*, there is no ambiguity in the second proviso of section 2201(v). DOE is directed to limit its enrichment of foreign-origin uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." By its location, the adverbial phrase "to the extent necessary" clearly modifies the action contained in the verb phrase "shall not offer." Moreover, as this Court recognized in *Young*, the words "to such extent" may encompass "to no extent," if the agency charged with applying the statutory language so determines. *See id.* at 2364-2366. The words used in section 2201(v), "to the extent," clearly permit DOE to interpret them in the same way. In short, the terminology and the phrasing of section 2201(v)—as well as its relationship to the rest of the statutory section of which it was made part—all suggest that section 2201(v) authorizes DOE not to impose enrichment restrictions where it concludes that they would not assure or maintain the viability of the domestic industry. Accordingly, "if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." *INS v. Cardoza-Fonseca*, —— U.S. ——, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring) (citations omitted); *see also Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (literal meaning should be followed unless it "would lead to absurd results . . . or would thwart the obvious purpose of the statute").

The interpretation given to section 2201(v) by the courts below would require DOE to impose enrichment restrictions automatically upon a finding that the domestic industry is not viable and to keep them in place indefinitely until the industry becomes viable. *See West-*

*ern Nuclear, Inc. v. Huffman*, 825 F.2d at 1440. The language of the statute, however, only requires DOE to consider whether enrichment restrictions are necessary "to assure the maintenance of" a viable industry. If, as DOE has concluded, *see* 51 Fed. Reg. at 27,135, the domestic industry is not viable and enrichment restrictions would not revive it, then a viable industry cannot be "maintained" by any action the Department might take.[3]

Further, as petitioners have illustrated, the courts below have construed section 2201(v) to require the imposition of enrichment restrictions without any logical or practical limitation:

> If, for example, the Secretary had found that the domestic uranium industry was not viable because all American uranium reserves had been exhausted, the interpretation adopted by the court of appeals would nevertheless require DOE to cease all enrichment of foreign uranium. But if there were no domestic uranium to enrich, and DOE was barred from enriching foreign uranium, the DOE would have no choice but to close its doors. Presumably, the fuel needs of American nuclear power plants would then have to be satisfied by importing foreign uranium *enriched* elsewhere—in Europe or the Soviet Union—while DOE's enrichment facilities stood idle.

Petition For Certiorari at 19 (emphasis in original). Respondents criticize this hypothetical "because Congress never contemplated such a fanciful situation, and would surely enact 'appropriate legislation' if domestic reserves were in fact ever exhausted." Brief In Opp. at 13 n.17, *citing* 42 U.S.C. § 2013(f) (1982). Nevertheless, "[j]udges interpret laws rather than reconstruct legislators' intentions." *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1224 (Scalia, J., concurring). "Where the language of those laws is clear"—as it is in the case of section 2201(v)—the courts "are not free to replace it with an unenacted legislative intent." *Id.*

[3] Respondents allege that DOE should have imposed enrichment restrictions beginning in 1981 in order to maintain the viability of the domestic uranium industry. Brief In Opp. at 4-5, 14-15. DOE's policy concerning enrichment restrictions prior to its finding in September 1985 that the domestic industry was no longer viable is not at issue here. By the time respondents initiated this lawsuit, the Department's existing criteria had already phased out all restrictions on DOE enrichment of foreign uranium as of January 1, 1984. *See* 39 Fed. Reg. at 38,017. Moreover, DOE had announced its intention to phase out all restrictions during its rulemaking in 1974. *See id.* Respondents failed to seek judicial review of the criteria when they were adopted. They may not do so now collaterally by seeking an injunction to prevent the enrichment of foreign uranium. *See Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985); *Independent Bankers Association v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980); *Nader v. NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975).



## II. DOE'S INTERPRETATION OF ITS AUTHORITY UNDER SECTION 2201(v) IS REASONABLE AND IS ENTITLED TO DEFERENCE.

### A. DOE's Interpretation Of Its Authority Is Supported By The Legislative History Of Section 2201(v) And By Congress's Subsequent Decision Not To Alter The Enrichment Restriction Guidelines Of Section 2201(v).

The discretionary nature of DOE's responsibilities under section 2201(v) is supported by the legislative history of the Private Ownership Act. In that Act, Congress sought to bring the atomic energy industry into the post-war era in which the predominant uses of nuclear power would be civilian, not military ones. S. Rep. No. 1325 at 3109-3115. In order to create a "more normal commercial market for natural uranium," the Act terminated the government's monopoly on the ownership of special nuclear material and, with it, the domestic uranium mining and milling industry's exclusive reliance on the government for its market. *Id.* Section 2201(v), added by section 16 of the Act, granted private parties access to enrichment facilities so that the uranium in-

dustry could deal directly with its ultimate customer, the utility industry. *Id.* at 3114. Further, section 2201(v) provided that, subject to Congressional approval, enrichment services would be made available for foreign uranium intended for use in the United States. *Id.* at 3120. Congress recognized, however, that by thus exposing the atomic energy industry to the play of private market forces, "this bill might have adverse effects on segments of the nuclear industry," and it sought to ameliorate such effects whenever possible. *Id.* at 3115.

Despite the acknowledged importance of a viable domestic uranium industry to the United States, Congress left the decision whether, in particular situations, to impose enrichment restrictions on foreign uranium intended for use in this country up to DOE:

> the language of the bill will permit the [Department] to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, *in its opinion*, the maintenance of a viable domestic uranium industry.

*Id.* at 3135 (emphasis added). The Department's discretion was made "flexible both as to the duration and degree of the restriction." *Id.* Consistent with this delegation of authority, therefore, DOE could elect to impose *no* degree of enrichment restrictions if, in its opinion, restrictions were not "necessary to assure the maintenance of a viable dometic uranium industry." *Id.* at 3134; *see also id.* at 3120 (same).

As in the text of section 2201(v) itself, the legislative history clearly distinguishes between the imposition of enrichment restrictions, which is discretionary, and the submission to Congress of DOE's proposed enrichment criteria (and proposed revisions and amendments to criteria previously approved), which is mandatory. *See id.* at 3135-3136. Congress recognized that it could not, in



1964, "predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence[,]" *id.* at 3135, much less two-and-a-half decades. Accordingly, Congress chose not to substitute, *a priori*, its judgment for the Department's as to whether, and when, enrichment restrictions would be necessary to assure the maintenance of a viable domestic uranium industry.

In arriving at this balance between the discretionary and the mandatory, Congress noted that it had rejected the idea of placing "an embargo or other statutory restriction on the importation of foreign uranium[.]" *Id.* at 3121.[4] Congress rejected a similar proposal in 1982 when, in enacting section 2210b, it linked DOE's findings on the domestic uranium industry's viability to the initiation of import-related investigations under U.S. trade law. During the previous year Congress had held hearings on the subject of DOE's enrichment policies. *See Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. (1981). In response, the Senate proposed to limit imports of both natural and enriched uranium to no more than 20 percent of domestic fuel needs. *See* 128 Cong. Rec. S2966-2970 (daily ed. Mar. 30, 1982). The Conference Committee rejected that proposal. *See* H.R. Rep. No. 884 at 50-52. Instead, it drafted new language requiring DOE, whenever imported uranium exceeded 37½ percent of domestic re-

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[4] Congress understood that the concern over the importation of foreign uranium was a concern over "imports of foreign uranium for enrichment and sale on the domestic market[.]" *id.* at 3120, and it understood that restrictions on the enrichment of foreign uranium were *de facto* restrictions on the importation of foreign uranium, since uranium in its natural state would be valueless to a United States importer who could not have that uranium enriched in this country.

quirements in any consecutive two-year period, to revise its enrichment criteria immediately "to enhance the use of source material of domestic origin . . . ." *Id.* at 17;[5] *see also* 128 Cong. Rec. S13,053-13,055 (daily ed. Oct. 1, 1982). The House of Representatives rejected that version, too. *See* 128 Cong. Rec. at H8802-8809; 128 Cong. Rec. S15,316-15,317 (daily ed. Dec. 16, 1982).[6]

As enacted, section 2210b requires DOE to issue an annual report on the viability of the domestic uranium industry and to establish specific criteria—including certain criteria enumerated by Congress—to be assessed in the annual reports. 42 U.S.C. § 2210b(a), 2210b(c). Section 2210b also authorizes the Secretary of DOE to determine, on the basis of the factual findings contained in such reports, whether imports of foreign uranium satisfy the statutory threshold for a successful "escape clause" action under existing trade laws—namely, whether imports are a "substantial cause of serious injury, or threat thereof," to the domestic industry. *Id.* § 2210b(d). If the Secretary so determines, the United States Trade Representative is required to initiate an escape clause action, which could result in the imposition of quotas, higher tariffs, adjustment assistance to help workers in the industry find new employment, or other relief measures. *Id.*; *see also* 19 U.S.C. § 2251 (escape

[5] "These modifications should provide for the greater use of uranium in the enrichment process and the increased increment of uranium should be restricted to uranium of domestic origin." H.R. Rep. No. 884 at 52.

[6] The Committee had also proposed to bar all contracting for foreign uranium (i) during the pendency of certain import-related trade law investigations (ii) triggered by a nonviability finding in (iii) any annual report DOE would be required to conduct on the state of the domestic uranium industry. H.R. Rep. No. 884 at 50-52. This series of contingent events leading to the automatic imposition of restrictions on contracting for uranium imports was equally objectionable to the House of Representatives. *See* 128 Cong. Rec. at H8802-8809.



clause investigation). Further, section 2210b specifies that whenever the Secretary determines that contracts or options involving source material or special nuclear material from foreign sources account for more than 37½ percent of domestic requirements for two consecutive years, or threaten to impair national security, he is required to request the Secretary of Commerce to initiate a "national security" investigation under existing trade laws, which also could culminate in the adjustment of import levels. 42 U.S.C. § 2210b(e); *see also* 19 U.S.C. § 1862 (national security investigation).

In short, after extensively considering whether to amend the statutory framework under which DOE makes enrichment services available for uranium imported from foreign countries, Congress left that framework—along with DOE's interpretation of its duties within that framework—intact. "This failure to change the scheme under which the [agency] operate[s] is significant, for a 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Young v. Community Nutrition Institute*, 106 S. Ct. at 2366, *quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

### B. DOE's Interpretation Of Its Authority Is Supported By The Department's Detailed Consideration Of The Regulatory Scheme It Administers And The Competing Interests Of The Utilities And The Uranium Industry.

Even if this Court should determine that, despite the persuasive legislative history supporting the plain meaning of section 2210(v), there is no "unambiguously expressed intent of Congress," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 843, DOE's interpretation of its statutory responsibilities—and its decision not to impose enrichment restrictions because they would not "assure the maintenance of a viable domestic uranium industry"—should be given effect as a "reason-

able interpretation made by the administrator of an agency." *Id.* at 844. *Accord American Paper Institute v. American Electric Power Service*, 461 U.S. 402, 423 (1983); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). *See also NLRB v. United Food & Commercial Workers Union*, —— U.S. ——, 108 S. Ct. 413, 419-420 (1987) (demonstrating "the continuing and unchanged validity of the test for judicial review of agency determinations of law set forth in *Chevron*") (Scalia, J., concurring).

In judging whether an agency's interpretation is reasonable and entitled to deference, this Court has considered whether "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and [its] decision involve[d] reconciling conflicting policies." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 865 (citations omitted). Clearly, the regulatory scheme DOE administers pursuant to section 2201 and related sections of the Atomic Energy Act, as amended, is technical and complex. *See, e.g.*, 10 C.F.R. Pt. 761 (1987) (criteria for determining viability of the domestic uranium industry).

It is equally clear that DOE has considered the matter of enrichment restrictions, and their effect on the viability of the domestic uranium industry, in a detailed and reasoned fashion. *See, e.g.*, Energy Information Adm., DOE, Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment (1985); Herrington Memo.; 51 Fed. Reg. at 3624; 51 Fed. Reg. at 27,132. As the Department most recently articulated the rationale for its determination under section 2201(v):

> The plain language of the statute makes clear the restrictions are not to be imposed for their own sake. Rather, DOE has a duty to determine whether their imposition would achieve the statutory objective of assuring the viability of the domestic industry. And, when DOE determines imposition would have a meaningless or counterproductive effect on this objective, DOE should not, and indeed, cannot impose restrictions.



51 Fed. Reg. at 15,632.

Moreover, in reaching its determination, DOE fully complied with the very procedures Congress established in 1982 as alternatives to revising the enrichment restriction guidelines of section 2201(v). Pursuant to section 2210b(a), the Department issued criteria—based on the factors enumerated by Congress—for determining the viability of the domestic uranium industry. 48 Fed. Reg. 45,746 (1983) (codified at 10 C.F.R. Pt. 761). Applying these criteria, DOE concluded that the domestic industry had been viable in 1983. Hodel Letter. In September 1985, however, the Department concluded that the industry had not been viable in 1984 and that the imposition of enrichment restrictions would not restore the industry to viability. Herrington Memo. Promptly thereafter, pursuant to his resporsibilities under section 2210b(d), the Secretary of DOE requested the assistance of the United States Trade Representative in assessing whether the Department's findings of fact in its 1984 report would satisfy the statutory threshold for a successful "escape clause" action with respect to uranium imports. Letter to Yeutter. The Trade Representative advised the Secretary that they would not, based on his independent conclusion that the economic difficulties experienced by the domestic industry were the result of long-term market forces and could not be alleviated by preventing DOE from enriching foreign uranium. Yeutter Response.[7]

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[7] The Trade Representative's conclusion was the product of expert judgment which carries a presumption of validity. *Cf. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Puerto Rico Maritime Shipping Authority v. FMC*, 678 F.2d 327, 335 (D.C. Cir.), *cert. denied*, 459 U.S. 906 (1982).

Finally, it is clear that DOE's decision not to impose enrichment restrictions involved reconciling manifestly competing interests. It should not be forgotten in the context of this litigation that a primary goal of the Private Ownership Act was to help restructure the atomic energy industry so that nuclear power could become "a major source of energy to meet our growing requirements for electricity." S. Rep. No. 1325 at 3113. Indeed, *the very first reason* given in the Senate report on the bill for enacting the legislation was to achieve normal economic conditions in the commercial uranium market so that domestic utilities could make and implement long-term plans—including fuel procurement commitments—to develop nuclear power as an alternative source of energy. *Id.* Thus, Congress intended to accommodate the electric utility industry's need for stable, long-range planning as well as the uranium industry's need for protection from substantial imports of foreign uranium for enrichment and sale on the domestic market, particularly during a period of limited demand for its product. *See id.* at 3120-3121. In 1964, however, the future demand for commercial applications of nuclear power looked promising. Indeed, Congress assumed that the civilian power industry and the uranium-producing industry shared common interests that the Private Ownership Act would help to promote. *Id.* at 3114-3115. More than two decades later, those interests have grown divergent, yet DOE remains the agency "charged with the administration of the statute in light of everyday realities." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 866. As such, DOE determined that where enrichment restrictions would not confer on the uranium industry the benefit sought by Congress—a state of viability—it would not impose those restrictions because of their cost to the nation's electric utility companies and their customers. *See* 51 Fed. Reg. at 27,134-27,135. The Department's decision was "a reasonable policy choice for the agency to make," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 845, to which this Court



should defer. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985); *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

### III. THE DISTRICT COURT'S INJUNCTION, AFFIRMED BY THE TENTH CIRCUIT, REPRESENTS AN IMPROPER JUDICIAL INTRUSION INTO DOE'S RULEMAKING.

Section 2201(v) requires DOE to establish written criteria setting forth the extent to which the Department's enrichment services will be made available for imported uranium. Further, it requires DOE to submit its proposed criteria to Congress for a 45-day review period before they can take effect. Thus, even if a court ruled that DOE interpreted its responsibilities under section 2201(v) incorrectly, the only proper remedy would be for that court to order the Department to issue criteria specifying the extent to which new restrictions on enrichment of foreign uranium would apply. *Cf. Burlington Northern Inc. v. United States*, 459 U.S. 131, 141 (1982) ("federal-court authority to reject [Interstate Commerce] Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (vacating new rules without reinstating old rule "avoids any problem of [appellate] court overstepping its authority, and leaves it to the agency to craft the best replacement for its own rule"). Instead, by enjoining DOE to impose specific limits on its enrichment of foreign uranium, the courts below not only have ousted the Department of its primary jurisdiction over the promulgation of enrichment criteria, but they also have deprived Congress of its role in scrutinizing and approving the criteria.

The district court's willingness to issue such an injunction and the Tenth Circuit's willingness to affirm it represent improper judicial encroachments into administrative rulemaking. The injunction effectively substitutes

the judiciary's own enrichment criteria for those lawfully issued by DOE. "Such usurpation of administrative power . . . ill serve[s] the orderly operation of the federal government. Nor [does] such action pay proper respect to the division of power inherent in the Constitution and the Administrative Procedure Act, . . . ." *Colorado Public Interest Research Group v. Hills*, 420 F. Supp. 582, 586 (D. Colo. 1976). *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978).

For the same reason, the injunction deprives the Department of its primary jurisdiction over the issuance of enrichment criteria, even where the courts found fault with the absence of new criteria restricting enrichment of foreign uranium. The courts, while retaining the final authority to expound a statute, are required to avail themselves of the aid implicit in the agency's superior expertise concerning the subject matter in question. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 305-306 (1973); *see also Conrail v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981). The authority to promulgate uranium enrichment services criteria was delegated by Congress, with good reason, to DOE, not to a federal court.

Section 2201(v) contains the 45-day review period requirement to ensure that any uranium enrichment criteria proposed by DOE become "subject to Congressional scrutiny." S. Rep. No. 1325 at 3120. By changing the effective enrichment criteria immediately, the injunction would circumvent the process of scrutiny and approval that Congress expressly reserved for itself.



## CONCLUSION

For the foregoing reasons, the opinion of the court of appeals should be reversed.

Respectfully submitted,

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